

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

V

DONALD HERDRICH,

Defendant-Appellee.

UNPUBLISHED
December 6, 2002

No. 238656
Wayne Circuit Court
LC No. 01-011064

Before: Gage, P.J., and Cavanagh and Wilder, JJ.

PER CURIAM.

The prosecution appeals as of right the trial court's grant of defendant's motions to suppress the evidence and to quash the information charging defendant with carrying a concealed weapon, MCL 750.227, possession of a firearm by a felon, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. We reverse and remand.

Defendant was driving a Dodge pickup truck eastbound on Nevada in the city of Detroit and was observed by two Detroit Police officers making a turn on to the Chrysler Service Drive without using his turn signal. The two officers initiated a traffic stop, approached defendant's vehicle, told him why they had pulled him over and requested that defendant provide them with his driver's license, proof of insurance, and vehicle registration. Defendant was unable to provide any of these documents, and was asked to step out of the car and put his hands on the hood so that he could be searched. Before beginning the search, the officer asked defendant if he had any weapons and defendant admitted to having a pistol tucked into his belt. The officer retrieved the weapon. Defendant was unable to provide a concealed weapons permit for the gun, and he was arrested and transported to the police station.

Defendant was bound over to circuit court following a preliminary hearing, and in the trial court defendant filed a motion to suppress the evidence and a motion to quash the information. Defendant argued that the police lacked reasonable suspicion and had no legal basis to search defendant during a stop for a civil infraction. The prosecution argued that because defendant was not actually touched during the search and seizure until he told the officer he had a weapon on his person, the search was legal. The trial court granted both motions. This appeal ensued.

The prosecution argues on appeal that the trial court erred in granting the suppression motion because the search and seizure was made incident to an arrest, an argument that was not

presented to the trial court. In general, issues that are not properly raised before the trial court cannot be raised on appeal absent compelling or extraordinary circumstances. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). However, this Court may nevertheless review the issue because its consideration is necessary to a proper determination of the case, and it is a question of law concerning which all of the necessary facts have been presented. *Id.* at 553.

To the extent a trial court's decision regarding a motion to suppress is based on an interpretation of the law, appellate review is de novo. *People v Zahn*, 234 Mich App 438, 445; 594 NW2d 120 (1999). Factual findings made in conjunction with a motion to suppress are reviewed for clear error. *People v Eaton*, 241 Mich App 459, 461; 617 NW2d 363 (2000).

A circuit court's decision to grant or deny a motion to quash charges is reviewed de novo to determine if the district court abused its discretion in binding over a defendant for trial. Generally, the standard for reviewing a decision for an abuse of discretion is narrow; the result must have been so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias. *People v Libbett*, 251 Mich App 353, 650 NW2d 407 (2002).

A defendant has the right to be secure from unreasonable searches and seizures under both the federal and state constitutions. US Const, Am IV; Const 1963, art 1, § 11; *People v Kaslowski*, 239 Mich App 320, 323; 608 NW2d 539 (2000). The purpose of the Fourth Amendment is to protect citizens from unreasonable searches and seizures. *People v Stevens (After Remand)*, 460 Mich 626, 634-635; 597 NW2d 53 (1999). In order to protect a person's rights from unreasonable searches and seizures, the police must show that they either had a warrant, or that their conduct fell within an exception to the warrant requirement. *Eaton, supra*, 241 Mich App 461.

"If the prosecution shows probable cause to arrest prior to a search of a man's person, it has met its total burden. There is *no* case in which a defendant may validly say, '[a]lthough the officer had a right to arrest me at the moment when he seized me and searched my person, the search is invalid because he did not in fact arrest me until afterwards.'" *People v Arterberry*, 431 Mich 381, 384-85; 429 NW2d 574 (1988), quoting *People v Chapman*, 425 Mich 245; 387 NW2d 835 (1986). Furthermore, "the exception applies whenever there is probable cause to arrest, even if an arrest is not made at the time the search is actually conducted." *People v Solomon*, 220 Mich App 527, 530; 560 NW2d 651 (1996). Also, that the officers do not have in mind the elements constituting probable cause does not change the validity of the search and seizure. *Arterberry, supra*, 431 Mich 384.

At trial and again on appeal, defendant has argued that the search and seizure was invalid because it occurred prior to the arrest. Defendant cites to *People v Parham*, 147 Mich App 358; 382 NW2d 786 (1985), in support of his assertion that the search in this case was illegal because defendant had only been stopped for a minor traffic violation. However, the present case is easily distinguished from *Parham*, since in *Parham* this court concluded that the search predicated upon a minor traffic violation was illegal because "the defendant was not under arrest, nor was there probable cause for an arrest." *Id.* at 360 (Emphasis added).

In this case, while defendant was stopped by the police for a minor traffic violation, he was not searched until the police discovered that he did not have a driver's license, a

misdemeanor for which probable cause existed to arrest. MCL 257.311. As noted in *Arterberry*, it is irrelevant whether the officer believed or intended that defendant would be arrested. Because probable cause existed, the search and ultimate arrest of defendant was permissible.

Defendant also argues that the search and arrest was invalid because he was never actually charged with failing to produce his operator's license under MCL 257.311. However, this is of no consequence to the police search because it is the prosecutor, and not the police, who is the chief law enforcement officer of the county. The prosecutor is granted the broad discretion to decide whether to prosecute and what charges to file. *People v Williams*, 244 Mich App 249, 253; 625 NW2d 132 (2001).

Because the trial court erred in suppressing the gun, the trial court also erred in granting the motion to quash the charges against defendant because the evidence presented at defendant's preliminary examination supported defendant's bindover on the charges of carrying a concealed weapon, MCL 750.227, possession of a firearm by a felon, MCL 750.224f, and felony-firearm, MCL 750.227b.

A person shall not carry a pistol concealed on his person in a vehicle operated by the person without a license to carry the pistol. MCL 750.227(2). Violation of MCL 750.227 is a felony. MCL 750.227(3). MCL 750.224f provides that a person convicted of a felony cannot carry or possess a firearm until the expiration of three or five years following the fulfillment of certain circumstances. MCL 750.227b states that a person who possesses a firearm during the commission of attempt to commit a felony is guilty of a felony. Evidence was introduced that defendant was a felon, and that he was carrying a .357 revolver that was hidden under his shirt and tucked into the waistband of his pants. Defendant did not have a concealed weapons permit. Therefore, the above evidence was sufficient to support defendant's bindover on all of the charges because evidence was presented on every element of the crimes charged. *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989).

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder